STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, d/b/a Ameritech Illinois	)	
	)	**Docket No. 00-0393**
Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service	)	

AMERITECH ILLINOIS' REPLY IN SUPPORT OF ITS APPLICATION FOR CLARIFICATION AND REHEARING OF THE ORDER ON REHEARING

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Illinois Bell Telephone Company ("Ameritech Illinois") hereby submits its Reply in Support of Its Application for Clarification and Rehearing of the Order on Rehearing in this case ("AI Appl."). This brief replies to the Joint CLECs' Motion to Strike and Response to that document ("CLEC Resp.") and to Staff's Response ("Staff Resp.").

EXECUTIVE SUMMARY

Perhaps the most significant aspect of the Staff and CLEC responses is that they do not object to the vast majority of the clarifications sought by Ameritech Illinois. Thus, there appears to be no dispute that the Commission should modify the tariff language in Appendix A to the Rehearing Order as follows:

- Section 2.9 – modify the definition of NGDLC (AI Appl. at 5);
- Section 4.1 – remove reference to "unbundled loop element" (AI Appl. at 5);
- Section 4.3 ? correct language regarding means of access to the Broadband "UNE"(AI Appl. at 6);
- Sections 3.4 and several others – remove references to DS1 OCD port, including full deletion of Sections 8.11 and 14.6.3 regarding providing a DS3 OCD port at a DS1 price (AI Appl. at 6-9);
- Sections 16.1, 16.2, and 16.3 – modify or remove these sections to comport with the Rehearing Order and facts (AI Appl. at 12-13) (although Staff does not fully agree with the clarification of Section 16.2); and
- Rehearing Order at 37 – remove reference to Texas contract terms (AI Appl. at 13).

On the two points where both the CLECs and Staff disagree with Ameritech Illinois' requested clarifications, they do not in any way refute Ameritech Illinois' grounds for clarification. Instead, they rely on arguments that are either irrelevant or factually inaccurate. For example, they argue that there is no *requirement* to allow Ameritech Illinois to propose the initial prices for the end-to-end Broadband "UNE," but ignore that there is no *basis* for adopting Staff's proposed costs because costs and pricing were not among the issues on which rehearing

was granted. They also ignore that it is the CLECs who most strenuously argued that cost testimony could be admitted only if all parties understood and agreed that no pricing determinations would be made. All parties did understand and agree to that, which is why Ameritech Illinois seeks to remove the premature adoption of Staff's proposed costs in Section 19.5 of Appendix A.

The CLECs and Staff also argue against using the Special Request Process as the method for dealing with new NGDLC line cards in Section 9.5 of Appendix A. The CLECs claim that the process is not well-defined and leaves questions unanswered, yet ignore that Appendix A's 30 calendar-day provision for new line cards is substantially less defined, leaves even more questions unanswered, and is inadequate to allow for any meaningful testing or evaluation of the deployability of new line cards. In addition, they fail to identify any benefit of the 30-day period as opposed to the Special Request Process or to dispute Ameritech Illinois' argument that the Special Request Process should be included in Section 9.5 to be consistent with the Commission's adoption of that same process in Section 7.7.2.

Staff (but not the CLECs) disagrees with Ameritech Illinois' request to remove the reference to Docket 00-0393 from Section 16.2 of Appendix A. Staff does not so much question Ameritech Illinois' request, however, as take exception to the Rehearing Order itself. That is not a permissible position for Staff to take at this stage, and in any event the Commission has already rejected Staff's argument.

Finally, the CLECs move to strike Ameritech Illinois' Application as either being improper with regard to an order on rehearing or improper because it relies on arguments made earlier in the case. Such claims reveal a fundamental misunderstanding of the law of rehearings and appeals in Illinois, as discussed below.

In sum, if the Commission does not reverse the basic holdings of the Rehearing Order as requested in Ameritech Illinois' Application, it should at a minimum make the clarifications that Ameritech Illinois has requested in order to ensure that Appendix A is consistent with the Rehearing Order itself and the record on rehearing.

ARGUMENT

I. THE CLECS' MOTION TO STRIKE IS BASELESS.

The CLECs seek to strike Ameritech Illinois' Application based on language in Section 10-113 stating that "[o]nly one rehearing shall be granted by the Commission." (CLEC Resp. at 3-4, citing 220 ILCS 5/10-113). As Staff confirmed in its response to the CLECs' Motion, that argument is groundless and has already been rejected by the Illinois Supreme Court.

There is no barrier to seeking rehearing of an order on rehearing. To the contrary, in cases where (as here) the new order relies on new evidence and/or materially modifies the original order, a second application for rehearing is required to preserve the applicant's appellate rights under state law.[1] The Illinois Supreme Court has held that "where an order entered after rehearing substantially modifies the first order it has the effect of an original order, to which an application for rehearing must be made as a condition precedent for appeal" and that if the order on rehearing was "based at least in part upon new evidence submitted since the entry of the first [order] it was in effect a new and different order on which an application for rehearing was required before an appeal would lie." *Continental Air Transport Co. v. Commerce Comm'n*, 38 Ill.2d 563, 566, 232 N.E.2d 728, 729 (1967), discussing *Scherer Freight Lines, Inc. v. Commerce Comm'n*, 24 Ill.2d 359, 362-64, 181 N.E.2d 134, 136-38 (1962) (dismissing appeal for failure to seek rehearing of an order on rehearing). *Accord, City of Edwardsville v. Commerce Comm'n*,

[1] In fact, Covad itself has sought rehearing of rehearing orders twice in the past year (in Dockets 00-0312/0313 and 00-0592), which proves that Covad does not even believe its own argument.

412 Ill. 34, 35-36, 104 N.E.2d 283, 284 (1952); *Alton R. Co. v. Commerce Comm'n*, 407 Ill. 202, 207-09, 95 N.E.2d 76, 78-80 (1950). Indeed, *Alton* flatly rejected the exact same argument that the CLECs make here based on the "[o]nly one rehearing" language in the statute. *Alton*, 407 Ill. at 209, 95 N.E.2d at 79.

The CLECs also claim that Ameritech Illinois' Application "must be stricken" because it relies on prior arguments. That theory is groundless as well. Applications for Rehearing always rely on or repeat prior arguments, as they must if the party seeking rehearing is to preserve those arguments for appeal under Sections 10-113 and 10-201 of the Public Utilities Act. In addition, the Commission's rule on rehearings expressly allows for incorporation by reference of prior arguments (83 Ill. Adm. Code. § 200.880(b)), which further refutes the CLECs' theory.

II. THE CLECS AND STAFF CANNOT POINT TO ANY PERMISSIBLE BASIS FOR IMPOSING STAFF'S PROPOSED COSTS FOR THE BROADBAND "UNE."

Section 19.5 of Appendix A adopts Staff's proposed cost modifications for the Broadband "UNE" on an interim basis, but the Rehearing Order itself never approved or even mentioned Staff's proposal. For this reason, and because all participants in this case agreed that pricing issues would not be decided here, Ameritech Illinois seeks to have Section 19.5 removed from Appendix A and to follow the longstanding practice of allowing the provider to propose the initial prices for a new product or service. Staff and the CLECs oppose that revision. Their claims, however, largely ignore Ameritech Illinois' actual arguments and the undisputed facts. It is undisputed that:

- ?? Ameritech Illinois and the CLECs agreed on the record that no one was seeking a decision on pricing issues in this case (Rhg. Tr. 49, 1555-57, 2506);
- ?? the cost testimony submitted on rehearing was provided *only* in response to Commissioner Squires's question, not to the order granting rehearing or as part of any issue raised in Ameritech Illinois' April 13, 2001 Application for Rehearing (Rhg. Tr. 2506); and

?? Staff was present at all on-the-record discussions on this matter – including the hearing on the CLECs' Motion to Strike Ameritech Illinois' Testimony (including cost testimony), which was held before Staff filed any testimony (Rhg. Tr. 49)[2] ? but never voiced any disagreement.

These facts all compel removal of Section 19.5 from Appendix A. Rather than address the facts, however, Staff tries a different tack. Staff first claims that, despite the agreement not to address any Pronto-related pricing issues here, it really only agreed that no permanent prices could be set. (Staff Resp. at 3-4). That is incorrect. Neither Staff nor any other party ever drew a distinction between interim and permanent prices.[3] What everyone agreed to was that *no* Pronto-related pricing decisions would be made here. Staff's assertion also overlooks the fact that Pronto-related pricing issues were not part of Ameritech Illinois' April 13 Application for Rehearing and thus were not ripe for decision on rehearing.

Staff also asserts that Ameritech Illinois cannot complain because it never responded to Staff's pricing proposal. (Staff Resp. at 3). Again, that is incorrect. Ameritech Illinois submitted rebuttal testimony detailing the flaws in Mr. Koch's proposal (Am. Ill. Rhg. Ex. 7.1 (Mears); Am. Ill. Rhg. Ex. 12.1 (Cass)) and further explained those flaws in its response to Commissioner Squires's questions. Am. Ill. Rhg. Br., Att. A at 15. Staff's assertion also misses the point. Ameritech Illinois could have – and would have – gone into much greater detail in refuting Mr. Koch if Pronto-related pricing issues had actually been part of Ameritech Illinois' April 13 Application for Rehearing and among the issues on which the Commission granted rehearing, but they weren't. Furthermore, because of the uniform understanding that cost information was being submitted *only* in response to Commissioner Squires's question, there was

[2] Thus, Staff's contention that it "was not fully aware of the scope of the agreement until the hearing commenced" (Staff Resp. at 3) appears to be inaccurate.

[3] In fact, the CLECs affirmed and relied on the parties' understanding by not submitting any cost or price-related testimony on rehearing.

no need for Ameritech Illinois to burden the record or extend the hearings with extraneous testimony and briefing on cost issues.

Finally, while Staff states that no one objected to the submission of its cost testimony, it overlooks the fact that the CLECs *did* object to admission of Ameritech Illinois' cost testimony (which, again, was submitted only in response to Commissioner Squires's question) until Ameritech Illinois agreed on the record that it was not seeking, and its April 13 Application for Rehearing had not raised, any type of Pronto-related pricing determination in this case. Rhg. Tr. 49, 1555-57, 2506. Staff's testimony necessarily was admitted with the same understanding.

The CLECs likewise ignore the undisputed facts and Ameritech Illinois' actual arguments. Worse than that, they ignore their own conduct throughout this case. The CLECs vehemently objected to any hint that any Pronto-related pricing decisions could or would be made in this rehearing. Rhg. Tr. 49, 1555-57, 2506. Now that Appendix A adopts unexamined interim costs that are apparently to their liking, however, they discard their prior agreement and protests and support the price-related decision. Such conduct should not be rewarded.

The CLECs argue that there is no requirement under state law to let Ameritech Illinois propose the initial prices for the Project Pronto Broadband "UNE." (CLEC Resp. at 7). But the question is not whether allowing the provider of a product to propose the initial price is required (though there is certainly no barrier to doing so). Rather, the question is whether adopting Staff's cost modifications is permissible given the limited issues on which rehearing was granted and the manner in which the cost modifications were imposed. It is not, as explained in Ameritech Illinois' Application (at 4-5, 14-17).

The CLECs also try to defend use of Staff's pricing through the true-up mechanism, stating that true-ups are often used. (CLEC Resp. at 7). That claim, of course, misses the point

that there must be at least some reasoned and explained basis for adopting the interim cost figure before imposing it on a company. (*See* AI Appl. at 16 n.17 and cases cited). Furthermore, a true-up would work just as well ? and would avoid all of the legal shortcomings of imposing Staff's unexamined proposal ? if it were based on prices initially proposed by Ameritech Illinois.

Accordingly, the Commission should remove Section 19.5 from Appendix A.

III. THE CLECS AND STAFF PROVIDE NO CREDIBLE ARGUMENT AGAINST USING THE SPECIAL REQUEST PROCESS FOR NEW LINE CARDS.

Section 9.5 of Appendix A requires Ameritech Illinois to deploy certain new, commercially available NGDLC line cards within 30 calendar days of a CLEC request, subject to economic and technical feasibility. The Rehearing Order does not discuss this requirement. Ameritech Illinois' Application requested that the Commission modify Section 9.5 to use the Special Request Process for new line cards, rather than the CLECs' arbitrary 30 calendar-day proposal. Ameritech Illinois explained that use of the Special Request Process would (1) be consistent with the Rehearing Order's decision (at 37) to adopt that process in Section 7.7.2 of Appendix A, which deals with similar CLEC requests for new functionalities, and (2) would allow for adequate testing time both to determine if a new line card was technically and economically feasible in the actual Project Pronto DSL architecture, and, if so, to make the changes necessary to deploy such new line cards. (AI Appl. at 9-12).

Staff and the CLECs oppose this request, but for different reasons. Staff states that the 30-day requirement "better reflects the Commission's rationale," but never explains how or why. (Staff Resp. at 5-6). It is true that Staff always supported some means for CLECs to seek deployment of new line cards when they became available, but nothing in Staff's testimony or briefs, or the Rehearing Order, ever advocated use of a 30-day period or explained how the 30-day approach could be reasonable, much less preferable to the established Special Request

Process. By contrast, the Commission has already granted Ameritech Illinois' request to adopt the Special Request Process in Section 7.7.2 of Appendix A based on similar arguments (*see* Am. Ill. Surr. Exc. at 6; Rehearing Order at 37), and the Special Request Process is the part of the Broadband Service Agreement that implements the FCC's *Project Pronto Order* with respect to new line cards and deployment of new features and functionalities.

The CLECs oppose use of the Special Request Process by claiming that "[n]obody, in fact, knows what it is." (CLEC Resp. at 8). That claim is patently disingenuous. The Special Request Process is part of the Broadband Service Agreement and has long been offered to comply with the FCC's *Project Pronto Order*. Rhythms itself has signed the Broadband Service Agreement in at least two states, so it obviously is well aware of the Process. Furthermore, *all* of the CLECs in this case have been present at detailed briefings on the Special Request Process, both in the collaboratives under the *Project Pronto Order* and in negotiations after the *Texas Arbitration Award*. And even for those CLECs that have not signed it, the Broadband Service Agreement, including the Special Request Process, is publicly available at https://clec.sbc.com.[4]

The CLECs also allege that the Special Request Process leaves many questions unanswered. (CLEC Resp. at 8). But every single one of the questions listed by the CLECs would still be unanswered under the 30-day language in Section 9.5 of Appendix A, so the criticism is meaningless. Moreover, the Special Request Process provides much more structure and certainty that the 30-day language, and any alleged uncertainties did not stop the Commission from adopting that Process in Section 7.7.2 of Appendix A.

Perhaps most significantly, neither Staff nor the CLECs dispute that the 30-day period would, as the record shows, be completely insufficient for Ameritech Illinois to test the new line

[4] At this website, click on "Interconnection Agreements," then on "Stand Alone Agreements," then on "Broadband Service Stand-Alone Agreement." The Special Request Process is set forth in Section 6.4 of the Broadband Service Stand-Alone Agreement.

card in its network, determine technical and economic feasibility, and make any necessary systems changes for deploying a new line card. *See* Rhg. Tr. 666 (Ransom), 2022-23 (Keown), and 1416 (Watson); AI Appl. at 9-10. By conceding that point, they concede the central practical reason for adopting the Special Request Process, which is that the arbitrary 30-day period is simply not adequate to perform all of the complex evaluations and modifications that would be necessary before deploying (or contesting the deployability of) a new line card. Accordingly, Section 9.5 of Appendix should adopt and rely on the Special Request Process as the method for evaluating CLEC requests for new capabilities in the Pronto DSL architecture, just as the Commission has already done for Section 7.7.2.

IV. STAFF'S POSITION ON SECTION 16.2 LACKS MERIT.

As Ameritech Illinois explained in its Application (at 12-13), the Commission should remove the reference to Docket No. 00-0393 from Section 16.2 of Appendix A because the decision in Docket No. 00-0393 does not require an audit of Ameritech Illinois' back office systems. Although the March 14 Order imposed an audit requirement identical to the one imposed in Docket Nos. 00-0312/0313, the Rehearing Order, which supersedes the March 14 Order's decision on direct access, removed the audit requirement. Moreover, the audit requirement has already been satisfied and the Commission has expressed no intent to order a second, identical audit of Ameritech Illinois' back office systems.

Although Staff opposes Ameritech Illinois' request, it fails to explain why the reference to Docket No. 00-0393 should remain in Section 16.2, especially when the Rehearing Order contains no requirement to conduct a second audit. Instead, Staff proposes that the Commission amend the Rehearing Order to require Ameritech Illinois to conduct another audit of its back office systems. As a preliminary matter, Staff cannot use its Response to Ameritech Illinois' Application as a mechanism to request substantive changes to the Commission's Rehearing

Order. The time for exceptions has come and gone, and while Staff in its Reply Brief on Exceptions requested that the Commission order a second audit of Ameritech Illinois' back office systems, the Commission rejected that proposal. Additionally, Staff's suggestion that the "intent" of Section 16.2 is to require a second audit of Ameritech Illinois' back office systems is incorrect. The intent of Section 16.2 is not to require a second audit of Ameritech Illinois' back office systems, but merely to require the results of the audit already conducted to be made available to any requesting CLEC. More importantly, by rejecting Staff's request in its Reply Brief on Exceptions to amend the Rehearing Order to include a second audit requirement, the Commission expressed its intent *not* to require a second audit of Ameritech Illinois' back office systems.

Accordingly, Section 16.2 should be clarified as requested by Ameritech Illinois. As noted earlier, the CLECs have not opposed this clarification.[5]

[5] With respect to other issues not addressed in this brief, which were not addressed by the CLECs or Staff, Ameritech Illinois respectfully refers the Commission to its recent Application for Clarification and Rehearing and the materials cited therein.

CONCLUSION

For the reasons stated herein, the Commission should reject the arguments of the CLECs and Staff and modify the Rehearing Order in the manner requested in Ameritech Illinois' Application for Clarification and Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Tyson Covey, an attorney, hereby certify that I caused copies of Ameritech Illinois' Reply in Support of Its Application for Clarification and Rehearing of the Order on Rehearing to be served on the parties on the attached service list by e-mail, messenger and overnight mail with all charges paid, on October 31, 2001.

_____

J. Tyson Covey